IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.11.2007

Coram:

THE HONOURABLE MR.JUSTICE S.TAMILVANAN

A.S.No.414 of 1996

Ponnusamy Gounder .. Appellant

vs.

1.Thotti @ Muthu Gounder
2.Lakshmi .. Respondents

Prayer: Appeal filed under section 96 of Civil Procedure Code against the judgment and decree dated 24.04.1995 made in O.S.No.274 of 1990 on the file of the Subordinate Judge, Sankagiri.

For Appellant : M/s.P.T.Asha

For Respondents : Mr.S.Doraisamy for R2
No Appearance for R1

J U D G M E N T

This appeal has been preferred against the judgment and decree dated 24.04.1995 made in O.S.No.274 of 1990 on the file of the Subordinate Judge, Sankagiri. The appellant herein is the plaintiff before the trial Court who filed the suit seeking money claim based on the promissory note, marked as Ex.A1.

2.According to the learned counsel for the Appellant/Plaintiff, the first respondent and One Mottaiyan Gounder had received a sum of Rs.30,000/- from the appellant/Plaintiff on 30.11.1988 and executed Ex.A1 promissory note. But, they did not repay the said amount with interest. Before the trial Court, the first respondent herein was absent and hence, he was set exparte. The second respondent is the mother of the deceased Mottaiyan Gounder. In support of the case of the appellant/plaintiff, apart from the appellant/P.W.1, P.Ws.2 to 4 were also examined and Exs.A1 to A14 were marked. On the side of the defendant, the second respondent herein was examined as D.W.1.

3.Considering the oral and documentary evidence, the trial Court held that it was a collusive suit between the appellant and the first defendant and accordingly, dismissed the suit directing the Appellant/Plaintiff to pay cost of the suit to the second respondent. Aggrieved by which, this appeal has been preferred by the Appellant/Plaintiff.

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4.According to the learned counsel for the appellant, execution of the promissory note has been proved by examining scribe and the attestors to the document and they have also stated about passing of

consideration. Therefore, the trial Court could have decreed the suit as prayed for instead of dismissing the suit.

5.Per contra, the learned counsel appearing for the second respondent would contend that there is a total denial in respect of the alleged execution of the promissory note by deceased Mottaiyan Gounder and also passing of consideration. According to the learned counsel for the second respondent, P.W.3 is the relative of the appellant and other witnesses are his friends and therefore, solely based on their evidence, it could not be held that the execution of the said promissory note has been proved. Further in Ex.A1, only two thumb impressions are available. Based on which, it cannot be said that the second thumb impression is that of the deceased Mottaiyan Gounder. It is seen that in Ex.A.1 at the space provided for attestation, though two signatures are available, the name and address of the attestors have not been stated in the said promissory note. Nearby the Revenue stamp, the scriber has written a small dot as scribbling of Thotti engira Muthu Gounder and the scribbling as Mottaiyan Gounder and that ink used by the attestors to affix the signatures are also different and therefore, according to the learned counsel for the respondents, the execution of promissory note has not been proved by the Appellant/Plaintiff.

6.In the impugned judgment, the trial Court has held that there is no evidence to show, as when did Mottaiyan Gounder die. Further, admittedly no pre-suit notice was sent to the second respondent. As per the evidence of the appellant/plaintiff, the notice dated 27.03.1998 was sent to the first defendant and one venkatachalam, husband of the second respondent, for which, copy of the notice and the postal acknowledgment card relating to the first respondent were produced. The attestors have said that the entire amount received from the appellant was taken away by the deceased Mottaiyan Gounder. But the same is not available either in Ex.A1 or in any other document. Admittedly, the second respondent is an illiterate woman. Even without a pre-suit notice, the suit has been filed against her. On the above circumstances, I am of the view that merely based on the oral evidence given by the plaintiff's witnesses, it cannot be decided that the execution of the said promissory note by the deceased Mottaiyan Gounder has been proved. Admittedly, neither party has taken steps to send the disputed thumb impression along with any admitted thumb impression for an Expert opinion, so as to prove the factum of affixture of thumb impression, scientifically. The finding of the court below that the appellant and the first respondent were collusive in instituting the suit is also not based on the evidence available on record. As the evidence of the plaintiff's witnesses are not sufficient to prove the execution of the document in question by the deceased Mottaiyan Gounder along with the first respondent, in order to meet the ends of justice, I am of the view to allow the appeal and set aside the impugned judgment and decree of the trial Court and remit back the same for fresh disposal, so as to expert evidence to decide the genuineness of the thumb impression of the deceased.

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7.In the result, the appeal is allowed and the matter is remitted back to the trial Court for fresh disposal. The appellant/plaintiff is directed to take steps for sending the

promissory note Ex.A1 containing the alleged thumb impression of the deceased Mottaiyan Gounder along with any admitted thumb impression of the deceased Mottaiyan Gounder, for the expert opinion of a finger print expert. Such step has to be taken within a period of eight weeks from the date of receipt of a copy of this judgment. The trial court should also provide a reasonable opportunity to both the parties and dispose of the matter independently, without considering the findings if any made in this judgment since the same would not be construed as expressing any opinion. The trial Court is also directed to dispose the suit on merits within a period eight weeks, after the receipt of the Expert opinion. The appeal is ordered accordingly. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

vri

To

1.The Subordinate Judge, Sankagiri.

2.The Record Keeper, V.R.Section, High Court, Madras.

one cc to M/s. Sarvabhauman, Associates SR.No.70533

one cc to Mr.S.Doraisamy, advocate SR.No.70573

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